the respective towers. On submitting this list, in its rough state, to the inspection of my friend Mr. Windele, he was so good as to render it more valuable, by making some corrections and adding several interesting notes. I afterwards sent the list to Dr. Petrie, for the same purpose, but have never since got it back from him, he having, unfortunately, mislaid it. I hope, however, that he may yet be able to lay his hand on the list, and return it to me.

It only remains for me to apologize for the length to which these notes have extended, and to state that I have been compelled to throw them together in a very short time, and in the midst of other labours. This will, I trust, help to account for any errors they may contain, and it may also elicit correction, which I earnestly invite, from some of our Kerry members, many of whose names appear on the Society's list of members. At all events, if my communication, dry and uninteresting as I am sure it is, shall tend to keep the importance of collecting and recording *accurate* descriptions of the Round Towers of Ireland before the Kilkenny Archæological Association, and if it shall, in any degree, however small, help to produce other and better written papers on the same subject, the chief end which I have had in view in compiling the present "notes" shall have been attained.

ON CERTAIN

OBSOLETE MODES OF INFLICTING PUNISHMENT,

WITH SOME ACCOUNT OF

THE ANCIENT COURT TO WHICH THEY BELONGED.

BY MARK S. O'SHAUGHNESSY, ESQ.

In a communication made some time ago to the Society, by one of the Honorary Secretaries, respecting the "Ancient Corporation By-Laws of Kilkenny,"[1] mention was made of resort being had, for the punishment of certain offences, to an engine therein termed the "tumbrell," and also the "swingling stool" and "cucking stool."

[1] *Transactions*, vol. i. p. 47. A comparison of the ancient Kilkenny corporation regulations with some of those old Scottish laws, to be found in Skene's collection, would repay the curious reader. Take, for example, "regulationes de panibus et piscibus vendendis—de regratariis (hucksters) —de brasiatore, carnificibus et pistoribus, &c.," among the *Leges et Consuetudines Burgorum*, editæ per D. David Regem Scotiæ ejus nominis primum apud Novum Castrum super Tynam. In the *Statuta Gildæ* also, many similar regulations appear. The *Iter Camerarii* also contains regulations about fishermen, hucksters, cobblers, forestallers, &c., as do the Statuta David II. and the Stat. Rob. III. In the *Ancient Laws and Institutes of Wales*, published under the direction of the Record Commission, the prices of cows, horses, and many other saleable commodities, are regulated.

It may not be without interest to the Society to have before it some information respecting this instrument and the old laws and customs which regulated its use. Such information may, perhaps, give some aid to a better understanding of old records, the examination of which cannot fail to present to the mind clearer views of the periods when the means of repressing social disorders were sought for principally in the infliction of bodily suffering,[1] even as the arbitration of every dispute was referred to physical strength;[2] and such inquiries will also enable us to watch how, as the spirit of early and fiercer times was passing away,[3] a growing conviction of the unfitness of such punishments was perceptible in their gradual disuse, and will teach us to rejoice that our days have fallen in these later and wiser times—as Homer says—

Ημεις τοι πατέρων μεγ' ἀμεινονες ἐυχόμεθ' ἔιναι—

We boast to be far better than our fathers—

the spirit of whose penal legislation seeks more anxiously the reclamation of the offender than the satisfaction of the outraged, and wisely perceives that such beneficent ends would be utterly frustrated by modes of punishment which a brutal spirit of vengeance alone could dictate, and by which there must be aroused in the sufferer a fierce hatred of the power which inflicted such indignities upon him.

"Corporal punishment," says Lambard, *Eirenarcha*, lib. i. cap. 12, "is either capital or not capital.—Not capital is of divers sortes also, as of cutting off the hand or eare, burning (or marking) the

[1] There is much curious information as to punishment in cases criminal in Dugdale's *Origines Juridiciales*, cap. 31.

[2] Although the practice of judgment by their peers, in the case of barons, is expressly stated in the *Grand Coustumier* (cap. ix. f. 19), and though Dugdale says that trial by jury was undoubtedly the most ancient form of trial, having been ordained by the law of king Ethelred, made at Wanting, yet, notwithstanding the inhibition of the church, as for example the popes Nicholas I. and Celestine III., we have Selden remarking—"but the English customs never permitted themselves to such clergy-canons, always (under parliament-correction) retaining, as whatsoever they have by long use or allowance approved, so this of the duel."—*Original of Duels*, cap. 5. Brady (*Hist. of England*, book ii. part 1) asserts that the twelve thanes or freemen (mentioned in Ethelred's law as above) associated with the præpositus, hundredary or reve, were not jurymen but judges or assessors. As to "Trials by Combat in Cases Civil," see Dugdale, *Orig. Jurid.*, c. xxvi., &c., and in *Cases Criminal*, c. xxviii.

[3] The institution, by Henry II. (as Dugdale believes), of the "Trial by Great Assize" in place of trial by combat in civil cases (on which see *Glanville*, lib. xxvii. cap. 7), is indicative of this; as is also the abolition by special precept, of trial by fire and water ordeal by Henry III., in the third year of his reign. See Montesquieu's views, *Esprit des Lois*, livre xxviii., especially in the chapter (17) entitled "Manière de penser de nos pères," and some subsequent chapters in the same book. Sir Matthew Hale (*History of the Common Law*, chap. vii.) says—"in all the time of king John, the purgation per ignem et aquam, or the trial by ordeal, continued, as appears by frequent entries upon the Rolls; but it seems to have ended with this king, for I do not find it in use in any time after. Perchance the barbarousness of the trial, and persuasives of the Clergy, prevailed at length to antiquate it, for many Canons had been made against it."

hand or face, boaring thro' the eare, whipping, imprisoning, stocking, setting on the pillorie, or Cucking Stool, which in old times was called the Tumbrell." And as to the causes of the arrangement of punishments, hear Hector Boëtius, quoted by Skene (*De Verb. Sign.*): —"Et merum imperium consistit in quatuor, sicut sunt quatuor elementa. In aere, ut hi, qui suspenduntur. In igne, quando quis comburitur propter maleficium. In aqua, quando quis ponetur in culeo et in mare projicitur, ut parricida, vel in amnem immergitur, ut fœminæ furti damnatæ. In terra, cum quis decapitatur et in terram prosternitur."

In the 3rd Institute, under the head "Tumbrel," the following is to be found:—"Furce, Pillot et Tumbrel append, al. view de Frankpledge. And every one" (remarks the learned Coke) "that hath a Leet or Market, ought to have a Pillory and Tumbrell, &c., to punish offenders, as Brewers, Bakers, Forestallers, &c." It seems also that "for want thereof the Lord may be fined, or the Liberty seised."[1] Thus, in some cases, in the time of Edward III., of summonses for claims of view of frankpledge, we find the court inquire if the claimant had pillory and tumbrell, and in one case it is laid down that "Pillory and Tumbrel belong to the Leet, without which justice cannot be done to the parties in the View, for, to punish at all times by amercement is contrary to common law."[2]

Further it appears, that, unless there were prescription to the contrary, the expense of the pillory and tumbrell was to be borne by the lord, and not by the inhabitants of the liberty, but stocks, "not being to punish, but to hold," were to be provided at the charge of the town.[3]

"Fossa, ane pit or sowsie, Furca, ane gallous, in Latine cabalum, quhilk was first institute and granted be King Malcome, quha gave power to the Barrons to have ane pit, quhairin women condemned for theft sud be drowned, and ane gallous quhair-upon men-thieves and trespassours suld be hanged, conforme to the doome given in the Barron Court there anent."[4]

"Pillory, collistrigium, as it were collum stringens, and Pillorium, from the French 'pelori,' and that may seem to be derived from the Greek πὸλη, janua, a door, because one standing on the Pillory put his head, as it were, through a door; and ορὰω, video—was called among the Saxons 'healsfang;' of 'heals,' a neck, and 'fang,' to take;" and Skene, referring to the "Leges Burgorum Scoticorum," says it was

[1] *Fleta*, lib. 2, cap. 12, § 29.—*D'Anvers*, ii. 289. Chitty's *Criminal Law*, i. 797.

[2] *Keilway's Reports*, fol. 140, 149, 152.

[3] D'Anvers, as above, and authorities cited therein.

[4] Skene, *De Verb. Sign.*: see also Spelman, *Gloss*; Blount; Cowel's *Interpreter*; Jacob; Cunningham. As to the distinction made between men and women criminals, see a case in Pitcairn's *Criminal Trials in Scotland* (vol. iii. p. 594), in 1636, in which the men were hanged and the women drowned, except such of the latter as had children, and they were burned in the cheek.

[5] Cowel; see also Jacob, &c., and that storehouse of varied knowledge, Ducange (*sub voce* Pilorium).

ordained for the punishment of baxters, (i. e. bakers); and he calls it also "jogs." Spelman, says, "Est supplicii machina ad ludibrium magis quam pœnam—inter fauces duarum tabularum ideo cavatarum collo spectaculum populo præbetur deridendum," but it is difficult to reconcile this notion of a joke, with the statement of Britton (*De Larcyns*, fol. 24.) that infamy resulted from the infliction of those punishments, and that the oath of the delinquent could no longer be received on juries, inquests, or in testimony; and so too Bracton, in the chapter, *De generibus pœnarum* (lib. iii. cap. 6), says, that those punishments were attended with infamy. Hence, the counsel of Coke (3 *Inst.* 219) that justices "should be well-advised before they give judgment of any person to the Pillory or Tumbrell;" and his cautious suggestion, "Fine and imprisonment for offences fineable by the justices aforesaid, is a fair and sure way."[1]

Mr. Morgan, an editor of the fourth edition of Jacob's "Law Dictionary" (1772), mentions that he remembers to have seen, on the estate of a relative of his in Warwickshire, the remains of a tumbrell, "consisting of a long beam or rafter, moving on a fulcrum, and extending to the centre of a large pond, on which end the stool was to be placed;" and Brand ("Popular Antiq.") quotes a description from Misson's "Travels in England." In Baines' "History of the County Palatine of Lancaster," it is stated that, about the close of the last century, a cuck-stool complete stood over a pit, near Longton, on the road from Preston to Liverpool; and Tomlins ("Law Dict.") states that within the memory of persons living in his time, it was used at Banbury, in Oxfordshire, towards women of notoriously immoral conduct, the pool still retaining the name of the cucking-pool.[2] It seems to have been used by the Saxons, by whom it was called "scealfing stole;" and in Domesday Book it is styled "cathedra stercoralis." Later,[3] we find it designated "trebuchet, turbichetum, tribuch, terbechetum," properly, (says Coke), a pit-fall or down-fall; and Barrington (*on the Statutes*, p. 30, *in notis*), derives it from the Celtic, "tre," ville, and our common word, bucket, "which is likewise probably Celtic," whence it will signify, the town or village bucket. But Ducange has it "Catapulta species, seu machina grandior ad projiciendum lapides," &c.; and so Mènage, who derives it thus, "De traboccare, comme qui diroit in buccam cadere, tomber dans un trou."[4] But it appears from Ducange, that there was also

[1] Those of the rank of gentleman, could not, according to the usage of the star-chamber, be whipped; the infliction of this punishment on Titus Oates was illegal.—Chitty's *Crim. Law*, vol. i. 796. As to punishment of witches in the pillory, see Tomlins' *Law Dict.* (4th ed.)

[2] Under a statute of James VI. (Scotland) A.D. 1567, cap. 18, entitled, "Anent the filthie vice of fornication and punishment of the samin," the offender shall, for the third offence, pay £100 (Scots), be thrice ducked in the foulest pool of the parish, and be banished the town or parish for ever; and shall be treated in the like manner for every further offence.—Hume's *Commentaries on the Law of Scotland respecting Crimes*, i. chap. 21 (page 464, 2nd ed.).

[3] Carta Joh. Reg. dat. ii., Junii, An. 1 Reg.

[4] Hereon also see Trèvoux.

a warlike machine called "tumbrellum,"[1] which name seems to have been that most commonly used for the instrument of punishment.

By Bracton it is styled "tymboralis," and in *Fleta* "tomborale." Coke tells us, in his day tumbrell was a word in use for a dung-cart; and later we have it used in this sense by Dryden,[2]

> "My corps is in a tumbril laid, among
> The filth and ordure, and inclos'd with dung."

The word took many shapes, as tumbrella, tymbrella, tymborella, and in a case reported by Keilway (8., *temp.* Edw. 3), "one John was summoned to answer for that he claimed view, waiffe, fourcher, pillory, and tumrell;" but this may be a misprint, as it appears frequently elsewhere in the book "tumbrell."

Jamieson, in his "Etymological Dictionary of the Scottish Language," questions the correctness of rendering "tumbrellum" by "cockstule," which he thinks the same as "pillorie;" for, he says, "*kaak* is a Dutch pillory, being an iron collar fastened either to a post or any other high place," although a derivation is given from the Teutonic "kolcken," ingurgitare, from "kolck," gurges, vorago, vortex; and, he adds, that in latter times it has been used to denote the pillory.

Ramsay has the following allusion to this instrument of punishment:—

> "The tane, less like a knave than fool,
> Unbidden clam the high Cockstool,
> And put his head and baith his hands
> Throw holes where the ill-doer stands."

Brand, too,[3] thinks the tumbrell different from the cucking-stool, founding his opinion on a claim (quoted by Cowel) made in Henry VII.'s time, in which a distinction is made between the offenders and the punishment, thus:—"punire ... braciatores (i.e. brewers) per tumbrellum, et rixatrices per *Thewe*, hoc est ponere eas super scabellum, vocat. a Cucking Stool;" and the derivation of cucking-stool given by Coke (under "the Trebuchet or Castigatory") would appear to fix that instrument as the punishment for scolds, but in so doing, carries its identity far away from the pillory on the etymological proofs which Jamieson thought perceptible. "Cuck or Guck, in the Saxon tongue signifieth to scould or brawl (taken from the Cuckhaw or Guckhaw, a bird, qui odiose jurgat et rixatur) and Inge, in that language (Water), because she was, for her punishment, soused in the water; and others fetch it from Cucquean, i.e. Pellex."[4] So Coke.

It was also termed "goginstole" and "cokestool," and by some

[1] *Gloss.* In French, tombereau, from the verb, tomber, see also Junii, *Etymol. Angl.*

[2] See Johnson's Dictionary.

[3] *Popular Antiquities*, vol. ii. p. 441.

[4] *Vide supra*, for its use in the county of Lancaster not long ago; and its identity with the custom which formerly obtained among the Saxons.

it is thought corrupted from choaking-stool, "quia hoc modo demersæ aquis ferè suffocantur."[1]

The court-leet,[2] or view of frankpledge, said to be the most ancient criminal[3] court in the land, had for its judge the steward ("who should be a barrister of learning and ability," says Tomlins), and the jury was composed of twelve freeholders. Dugdale says this court was originally that spoken of as "tryhing" or "lathe" (among the Saxons) in which the barons and freeholders of these parts were judges.[4]

The existence in England of the court-leet, with its other appellation of "view of frankpledge," seems to have sprung out of the institution of Alfred the Great, that all the freemen of the district should be mutual pledges for the good behaviour of each other;[5] and

[1] Skinner's *Etymologicon, sub voce*, "Cucking Stool." Tomlins' *Law Dict.* (4th edition.)

[2] "Leta, from the Saxon "lite," i.e. parvus, quasi a little court; or from the German "laet," a country judge."—Jacob. "In Kent," says Dugdale, *Antiq. of Warwickshire*, "those divisions of the country are called Lathes, which with us are called Hundreds." See also 4th *Inst.* cap. 54. D'Anvers *ubi supra*. Tomlins says, "Though we do not meet with the word among the Saxons, there can be no doubt of the existence of the thing."—*Law Dict.*

[3] "The Court-Baron being of no less antiquity in civil."—Tomlins. The ancient court-baron of the manor of Sunderland was revived by the earl of Durham, and opened on the 21st of July, 1840. See Richardson, *Local Historian's Table Book*, vol. v. p. 180.

[4] *Orig. Jurid.* cap. 15. As to the tryhing or lathe, see cap. 12, in which instances are given of titles to land being tried in this court. See also "De trihingis et ledis" among the laws of king Edward the confessor in Lambard.

[5] Blackstone, *Commentaries*, book iv. c. 19. Hawkins, *Pleas of the Crown*, book ii. c. 11. Alfred reigned from 871 to 900. In the laws of king Edgar, who reigned from 959 to 975, is the following: "This is the Ordonnance how the Hundred shall be held. First, that they meet always within four weeks: and that every man do justice to another. 2. That a thief shall be pursued . . . . If there be present need, let it be made known to the Hundredman, and let him [make it known] to the tithing-men; and let all go forth to where God may direct them to go: let them do justice on the thief, as it was formerly the enactment of Edmund" (the commencement of whose reign was in 940). But the origin of the institution would seem to belong to a much earlier period. The following passage from the "Esprit des Lois," ascribes it to the sons of Clovis whose death occurred in 511:—"Comme tous les hommes libres étaient divisés en centaines, qui formaient ce que l'on appelait un bourg, &c.

"Cette division par centaines est postérieure à l'etablissement des Francs dans les Gaules.

"Elle fut fait par Clothaire et Childebert dans la vue d'obliger chaque district à répondre des vols qui s'y feraient. On voit cela dans les décrets de ces princes."—livre xxx. chap. 27.

"Nous avons remarqué en plus d'endroit, que de vieux usages perdus ailleurs se retrouvent en Angleterre, comme on retrouva dans l'île de Samothrace les anciens mystères d'Orphée."—Voltaire, *Dict. Philos.* art. *Clerc*, where some remarks on benefit of clergy, also will be found. See also Guizot's *Representative Government*, lecture 4, part i. Thierry (*Norman Conquest*, book ii. A. D. 878 to 885) says the custom of reckoning families as simple units, and then aggregating them in tens or hundreds to form districts and hundreds, is found among all people of Teutonic origin; and states that tythings and tything-men, hundreds and hundred-men existed among the Saxons and Angles, prior to their emigration, and that the system was adopted by Alfred. It appears that the institution exists in Russia now-a-days, where the great feature of the rural system is, that every head of a peasant family is a member of a *commune*, and as such has a right to a portion of land. At the head of each village is the *starosta*, who presides over a council called the *ten*. The election of councillors is made annually

the happy results of this ordinance are described by Lambard (*Perambulation of Kent*, p. 27) to have been "that if a man had let fall his purse in the highway, he might at great leisure and with good assurance have come back and taken it up again." In the leet all offences under high treason could be enquired into, its jurisdiction[1] being as extensive as its prototype, the gothic "hæreda," which "de omnibus quidem cognoscit non tamen de omnibus judicat;"[2] and ranging (in the words of Blackstone) "from common nuisances and other material offences against the King's peace, down to eaves-dropping, waifs, and irregularities in public commons;"[3] or, in the more general description of Coke (accounting for the sheriff's tourn and the leet being courts of record, and not the courts of the county, of the hundred, and the courts-baron), "instituted for the Commonweal, as for conservation of the King's peace, and punishment of common nuisances, &c."[4]

But the particular articles which were to be given in charge by the steward were set forth in certain statutes, as, for instance, the 17th Edward II., the statute for view of frankpledge; the 51st Henry III.,[5] "The Assise of Bread and Ale;" the 2nd Edward VI., cap. 10, for the punishment of any corruption in the making of malt for

by the peasants. The apportionment of the *obrok* (a fixed tribute to the lord), the distribution of land escheated by the death of the occupiers, the punishment of minor offences, and the arrangement of local disputes, form some of the offices of the council. Several villages form a district, over which is an officer called a *starchina*, who, with assessors, holds a court in which recruits for the army are levied. The *starchina* is elected by deputies sent from the villages of the district, a number of which districts form a *volost*, under a functionary also elected, who, with assessors, forms an higher court of more extended jurisdiction. Here may be traced the *tything* forming the court-leet, over which was the headborough, or tything-man; then the *hundred-court* (under the bailiff), formed out of ten tythings; and, finally, the *county-court*, with the shire-reeve, or sheriff, presiding—(*Etudes sur la Situation Intérieure, la Vie Nationale, et les Institutions Rurales de la Russie*, par le Baron Auguste de Haxthausen, Hanovre, 1852). "The most remarkable approximation to our own institution seems to have existed at an early period in Russia for the trial of criminal cases. In the French translation of M. Karamsin's *Histoire de Russie*, we find the following: 'Le plus ancien code des lois russes porte que douze citoyens assermentés discutent suivent leur conscience les charges qui pèsent sur un accusé, et laissent aux juges le droit de determiner la peine.'"—Forsyth's *History of Trial by Jury*, p. 37, *note;* see also the same work (chap. iv. sect. 4) as to the different kinds of Anglo-Saxon courts.

[1] 4 *Inst.* 265. D'Anvers, ii. 290. *Jurisdictions, or the lawful authority of Courts Leet, &c., &c.*, written by the methodically learned John Kitchin of Gray's Inne, Esq., London, 1663.

[2] Bl. *Com.*, b. iv. c. 19, quoting Stiernh. *de jur. Goth.*

[3] *Ibid.*

[4] 4 *Inst.* 263. See the following, in *Hudibras*, as to "what base uses" it was turned to in the seventeenth century:—

> "Be forced t'impeach a broken hedge
> And pigs unring'd at *Vis franc* pledge.
> Discover thieves, and bawds, recusants,
> Priests, witches, eaves-droppers, and nusance;
> Tell who did play at games unlawful,
> And who fill'd pots of ale but half-full."

[5] Are the advocates of the "rights of women" aware that to the parliament or council upon this occasion (A.D. 1266) held at Winchester, all the wives of the nobles who had been killed in war, or of those captive, were summoned? The word in the statute, as Barrington points attention to, is braciatrix, a woman-brewer; so the sex appears to have had a share, on this occasion at least, in legislating for itself.

public use, &c.;[1] but, after the passing of the statute of Marlbridge, 52nd Henry III., cap. 10, their business gradually devolved upon the courts of quarter sessions.[2] Nevertheless, that the court was resorted to, in queen Elizabeth's time,[3] for the punishment of frauds in measures, seems evident from the following:—

> "And rail upon the hostess of the house
> And say you would present her at the Leet,
> Because she brought stone jugs and no seal'd quarts."[4]
> *Taming of the Shrew.*

The class of offences for the punishment of which the pillory[5] and the tumbrell, in connexion with the court-leet, were most commonly used, seem to have been the corruption of provisions and all such and other matters which could be accounted to be common nuisances. Thus, Dodridge, justice of the king's bench, says, in Trinity Term, 16th James I., "that such nuisances as the Leet had power to redress

The statute intituled *Assisa Panis et Cervisiæ* was 51st Henry III., stat. i. (anno 1266); that intituled "Judicium Pillorie" was passed in the same year, stat. vi. So much of the former as referred to the assize of bread was repealed by the 8th Anne, cap. 18. "There are also few sums or constitutions relative to the law, which tho' possibly not Acts of Parliament, yet have obtained in use as such; as Statutum Panis et Cervisæ, Judicium Collistrigii, and others."—Hale, *History of the Common Law*, chap. vii. *temp.* Henry III. It is perhaps not unworthy of mention (*à propos* of this doubt) that the curious collection of customs called *Regiam Majestatem* (date about 1154), are said by Lord Stair (*Institutions*, b. i, t. 1, s. 16) to have been compiled for the custom of England, and though mentioned in the Scottish Parliaments of 1425 and 1487, were only so mentioned as what may, on revision become law. This opinion is examined in Erskine's *Institutes*, b. i, t. 1, s. 32. The following occurs in Fabyan's *Chronicle*, *temp.* 12th Henry III.: "In processe of tyme after, the sayde syr Hughe (Bygotte) wᵗ other, came to Guylde hall, and kept his courte and plees there without all ordre of lawe, and contrary to the lybertyes of the Cytie, and there punysshed the bakers for lacke of syze by the tūberell, where before tymes they were punysshed by the pyllery, and orderynge many thynges at his wyll, more thā by any good ordre of lawe."—Ellis' edition, p. 345. In the second year of Edward I., the following is recorded: "After the solempnytie of the Coronacion was ended, the king... ordeyned certayne newe lawes for yᵉ welth of the realme, whiche are to longe here to reherce; amōge the whiche one was that bakers makynge brede, lackynge the weyght assygned after yᵉ pryce of corne, shuld first be punysshed by losse of his brede: and the seconde tyme by prysonement: and yᵉ thirdly by the correccion of the pyllory. And myllers for stelyng of corne to be chastysed by yᵉ tumbrell, and this to be put in execucion he gave auctoytie to all mayres, baylyffes, and other offycers thorough Englande, and specyally to the mayre of London."—Fabyan's *Chronicle;* Ellis' edition, p. 385.

[1] As to punishment for unreasonable victualling charges, victuallers conspiring, selling corrupt victuals, &c., see Lambard, *Eirenarch.*, b. iv. c. 4. As to restrictions on common brewing and baking in the fifteenth century, see Brand's *Newcastle*, vol. ii. 16.

[2] Blackstone, *ubi supra.*

[3] But see hereafter the case of the *Queen* against *Foxby*, tried in Anne's time before the justices at quarter sessions and not in the leet.

[4] "No sealed quarts."—"Sub sigillo Burgi debent signari."—*Leges Burgorum*, cap. 52.

[5] "Mr. Butler—My Lord, we insist upon it, that the pillory is the punishment of the cheat.

Court—We know if Mr. Hurly be not able to pay the fine he ought to suffer corporal punishment." "Trial of Patrick Hurly of Moughna, in the county of Clare, for perjury, and conspiring to cheat the Popish inhabitants of the county of Clare," (A.D. 1701) in *Howell's State Trials* xiv.; see note at page 446, also page 1099, same volume. See also vol. iii. 401, vii. 1208, and xix. 809, *in notis*; also vol. xx. p. 781.

should be immediate and public nuisances;"[1] and so there came under its cognizance, among other nuisances, that of being a common scold, which, in practice having long ceased to be the subject of prosecution,[2] may be brought forward to some little prominence. Two such cases, at least, can be quoted: one having been before the court of queen's bench as lately as in the time of Anne, and to the mention of them may be added, that though recent legislation has abolished the pillory as an ignominious punishment,[3] some stern necessity may (but not, it is to be hoped, during the reign of the gentle lady—our present gracious sovereign) arouse again an old demand, to wit:—"Reclaim the obstinately opprobrious and virulent women and make the Ducking Stool more useful."

In Hilary Term, thirteenth year of James I., a question arose as to the justification of a constable under the following circumstances. It appeared that Margery, the wife of one Curteys, had been presented in the leet as a common scold, and the constable went as directed by the seneschal to punish her according to law. It is not wonderful that one of her disposition should have demurred violently to the proceeding, and an assault and battery ensued. It does not appear that Margery underwent the sentence, but this case decided the justification of the constable and his assistants in punishing common scolds upon a presentment in the leet.[4]

The second case was that of the *Queen* against *Foxby*,[5] who it appeared had been convicted by the justices of the peace at their quarter sessions at Maidstone, upon an indictment that she was a common scold, and judgment was given that she should be ducked. A motion was made in the queen's bench, in Trinity Term, 1703, in arrest of judgment, that the indictment was, that she was *communis calumniatrix*, which is not the Latin word for a scold but *rixatrix*, whereupon Sir John Holt, chief justice, said, "It were better ducking in a Trinity (i. e. May or June) than in a Michaelmas (November) Term." Judgment was arrested in Michaelmas Term, and the case came again before the court, on a writ of error, in Trinity Term the following year, when affidavits were produced that she was so ill (a nervous attack in all probability, the ducking still impending) that without danger of her life she could not come up out of Kent, where she lived, to assign error in person, according to the course of the court; and the time was enlarged "to see how she would behave

[1] *Dewell*, v. *Sanders and Tedder*, in ii. *Rolle's Reports*, 31.

[2] Stephens' *Commentaries*, iv. 336, (3rd edition).

[3] The Act, 7th Wm. IV., and 1st Vic., (cap. xxiii.) enacts, "that from and after the passing of this Act (30th June, 1837,) judgment shall not be given and awarded against any person or persons convicted of any offence, that such person or persons do stand in or upon the Pillory." It is then provided that by this Act the punishment of pillory alone is affected thereby. The 56th Geo. III., cap. 138, had limited its use to the punishment of perjury.

[4] This was *Curtey's Case*, in *Moore's Reports*, p. 847. See also, for more on this subject, page 32, of "*The Office of the Constable*," London, 1791.

[5] *Modern Reports*, vi. 11, &c.

herself in the meantime," the court remarking that "scolding once or twice is no great matter, for scolding alone is not the offence, but the frequent repetition of it,[1] to the disturbance of the neighbourhood, makes it a nuisance, and as such it has always been punishable in the Leet, and ideo indictable." The chief justice seems to have had other than merely legal reasons for enlarging the time, for he added, "ducking would rather harden than cure her; and if she were once ducked she would scold on all the days of her life."[2] Finally, the court did lean to the merciful side, construed the penal enactment strictly, and reversed the judgment (in Michaelmas Term), the indictment being, that she was *communis rixa*, instead of *rixatrix*. That, about Elizabeth's time, the instrument in question was of common use in such cases, seems very probable from the following, in Beaumont and Fletcher's "Woman's Prize:"

> "Moroso—Do you hear the rumour?
> They say the women are in insurrection,
> And mean to make a —
>
> "Petronius—Let 'em, let 'em!
> We'll ship 'em out in Cuckstools, there they'll sail
> As brave Columbus did, till they discover
> The happy islands of obedience."—Act ii. scene 1.

And that it had not gone out of use in the time of the "merry monarch" we may quote the learned and witty Samuel Butler:—

> "So men decree those lesser shows
> For victory gotten without blows,
> By dint of sharp hard words, which some
> Give battle with, and overcome;
> These, mounted in a chair-curule,
> Which moderns call a cucking-stool,
> March proudly to the river's side,
> And o'er the waves in triumph ride:
> Like dukes of Venice, who are said
> The Adriatic sea to wed;
> And have a gentler wife than those
> For whom the state decrees those shows."
>
> *Hudibras*, part ii. canto ii.

A few extracts from some old laws may not be uninteresting before concluding.

That baking and brewing could not be carried on without permission of the authorities, is evident from a passage (in Cowel) from

[1] In *Withers* v. *Henley*, 1 *Rolle's Rep.* 241, Coke says, "The continuance of a nuisance is a new nuisance."

[2] Brand (*Popular Antiq.*, vol. ii. p. 445), speaks of the "branks," another punishment for scolding women, used at Newcastle-under-Lyme, preferable, he thinks to the "cucking stoole," "which not only endangers the health of the party, but also gives the tongue liberty 'twixt every dip." He quotes an old poem which would corroborate his lordship's view as given above:—

> "Down in the deep, the Stool descends,
> But here, at first we miss our ends.
> She mounts again and rages more
> Than ever Vixen did before."

a MS. book concerning the Laws, Statutes, and Customs of the Free Borough of Mountgomery, from the times of Henry II.:—"Item utimer de Pandoxatricibus,[1] quod nemo potest brasiare sive pandoxare in villa et Burgo nostro, nisi..., si talis Pandoxatrix brasiaverit, ...debet capi per Ballivos, amerciari,...primo et secundo, et si tertia vice Assisam fregerit, debet capi per Ballivos, et publice duci ad locum ubi situatur le Gogingstole, et ibi debet eligere, unum de duodus, viz., an velit le Gogingstole ascendere, an illud judicium redimere ad voluntatem Ballivorum."

That the ducking stool was not reserved for the especial use of the fair sex, appears from the following:—"Eif they trespasse thrise, justice sall be done upon them: that is, the Baxster (i.e. *Baker*) sall be put upon the Pillorie (or halsfang) and the Browster (i.e. *Brewer*) upon the Cockstule."—*Burrow Lawes*, c. xxi. sec. 3. Ducange has the latter, thus:—"Brasiatrix super Tumbrellum, quod dicitur castigatorium." Again, take the following from the "Law of Preston in Amoundresse, which they have from the Law of the Bretons."[2]—"If a Burgess shall be in mercy for Bread and Ale, the first, second, or third time, he shall be in mercy, 12d, but the fourth he shall go to the Cuckstool." And that north of the Tweed the women were not safe from this seat, appears from a law of queen Mary, 1555 (cap. 40), "The women perturbatouris for skefrie (i.e. extortion, or any unlawful way of getting money) sal be taken, and put upon the Cukstules of everie burgh or towne."[3]

In conclusion, the great antiquity of the modes of punishment which this paper has been intended to illustrate, may be shown by the following, from Sir Henry Spelman:—"Submersionis hic ritus pervetustus fuit apud Germanos majores nostros. Sic enim Tacitus in eorum moribus 'Distinctio pœnarum ex delicto. Proditores et transfugas arboribus suspendunt, ignaros et imbelles et corpore infames cœno et palude, injecta insuper crate, mergunt.'" (Cap. 12, De Mor. Ger.)

[1] *Pandoxatrix*, an alewife that both brews and sells ale and beer.

So Shakespear—"Ask Marion Hackett, the fat alewife of Winton."—*Taming of the Shrew.*

[2] Baines' *History of the County Palatine of Lancaster*, vol. iv. p. 300.

[3] For the punishment of forestallers and regrators, see Hume's *Coms.* (Scotland) i. ch. 25, p. 503.